

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE:

B-215168

DATE: October 3, 1984

MATTER OF:

Hybrid Technology Group, Inc.

DIGEST:

1. Protests alleging deficiencies in an invitation for bids apparent prior to bid opening must be filed with either the contracting agency or GAO before bid opening in order to be timely.
2. A bid is properly rejected as nonresponsive where the offered product does not conform to the solicitation's specifications.
3. Contracting officer's determination concerning price reasonableness is a matter of administrative discretion which GAO will not question unless the determination is unreasonable or there is a showing of bad faith or fraud.
4. GAO will not review a protest challenging a bidder's intended compliance with its representation in its Buy American certificate that domestic source end products will be supplied.

Hybrid Technology Group, Inc. (Hybrid), protests the award of a contract to Karl Suss America, Inc. (KSA), under invitation for bids (IFB) No. 3-503955 (Re-Ad) issued by the National Aeronautics and Space Administration, Lewis Research Center (NASA), for a mask alignment exposure system (used to make integrated circuits on microchips for computers by focusing light for various lengths of time on silicon wafers covered with photosensitive material). Hybrid contends that the specifications were ambiguous, difficult to read, written around KSA's equipment and were an overstatement of the agency's needs. Hybrid contends that its low bid should not have been rejected as nonresponsive. Finally, Hybrid argues that KSA's bid should not have been accepted because KSA's price is approximately double that which Hybrid bid and Hybrid alleges that KSA will not perform the contract in accordance with KSA's Buy American certificate.

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The protest is dismissed in part and denied in part.

Three bids were received under the solicitation:

Hybrid	\$ 49,983.50
Optical Associates, Inc.	\$ 59,975.00
KSA	\$105,360.00

The two lowest bids were found to be nonresponsive. Award was made to KSA.

Hybrid's allegations relating to the specifications are untimely and will not be considered on the merits. Our Bid Protest Procedures require that protests alleging deficiencies in an IFB apparent prior to bid opening must be filed with either the contracting agency or this Office before the time set for bids to be opened in order to be considered. 4 C.F.R. § 21.2(b)(1) (1984). Here, although there is no doubt that the alleged improprieties would have been apparent prior to bid opening (for example, Hybrid states that "it is obvious that the spec was written around a machine from Karl Suss . . . as was in the [1983] solicitation"), Hybrid did not file its protest until over a month after bids were opened. Therefore, these issues will not be considered. Richard A. Schwartz Associates, Inc., B-214979, June 29, 1984, 84-1 C.P.D. ¶ 695.

Hybrid argues that its low bid was improperly rejected as nonresponsive. We disagree. Hybrid's bid was rejected for two reasons. One reason for Hybrid's rejection is that the IFB required the systems bid to have an exposure time range of 0.5 seconds to 1 hour and the descriptive literature for Hybrid's system stated that its exposure time range was 0.1 second to 999.9 seconds (less than 20 minutes). Hybrid argues that its system, which admittedly does not meet the exposure time range requirements of the specification, would nonetheless meet NASA's needs. We deny this aspect of the protest.

Since Hybrid did not file a timely protest against the terms of the solicitation, this Office can only review the question of whether Hybrid's bid was responsive to the actual requirements of the solicitation. See Artco Contracting, Inc., B-212304.2, Aug. 3, 1983, 83-2 C.P.D. ¶ 167. To be responsive, a bid as submitted must be an

unequivocal offer to perform or provide the exact thing called for in the solicitation, so that acceptance by the government will obligate the contractor to perform all its material terms and conditions. Pioneer Industrial Products, B-209131, Mar. 22, 1983, 83-1 C.P.D. ¶ 286. Hybrid's bid, which offered a system with an exposure time maximum of less than 20 minutes, clearly deviated from the specification requirement of a 60-minute exposure time, and the bid, therefore, was properly rejected as nonresponsive.

In view of the fact that Hybrid was properly found to be nonresponsive based upon the exception it took to the exposure time requirement, there is no need to address the other basis on which Hybrid was determined to be nonresponsive.

Hybrid contends that KSA's bid should not have been accepted because it is approximately double the price of Hybrid's bid.

The authority vested in the contracting officer to decide whether or not to cancel an invitation and readvertise is extremely broad. Fowler's Refrigeration and Appliance, Inc.--Reconsideration, B-201389.2, May 11, 1981, 81-1 C.P.D. ¶ 368. NASA Procurement Regulation (NASA PR), § 2.404-1(b)(v), 41 C.F.R. chapter 18, volume I (1983), authorizes cancellation for compelling reasons where "all otherwise acceptable bids received are at unreasonable prices." We have stated that a determination concerning price reasonableness is a matter of administrative discretion which our Office will not question unless the determination is unreasonable or there is a showing of bad faith or fraud. Introl Corp.; Forster Enterprises, B-209096, B-209096.2, June 9, 1983, 83-1 C.P.D. ¶ 633. Here, the protester has not alleged bad faith or fraud. The agency has stated that the award to KSA, whose bid was approximately \$50,000 higher than that of the protester, was proper considering the exceptions taken by the protester which affected "both price and quality." In our opinion, Hybrid has not shown that the administrative determination relating to KSA's price was unreasonable.

Hybrid's final contention is that KSA will not perform the contract in accordance with its Buy American certificate. KSA certified that approximately 30 percent of the proposed contract price represents foreign content or effort and that all of the end products are domestic end products.

In accordance with NASA PR, § 6.001(d), 41 C.F.R. chapter 18, volume II (1983), NASA states that it determined that KSA was going to supply "United States end products" and that KSA was a "domestic concern" as defined in NASA PR, § 6.001(e).

Where, as here, a bidder excludes no end products from the Buy American certificate in its bid and does not indicate that it is offering anything other than domestic source end products, the acceptance of the bid, if otherwise acceptable, will result in an obligation on the part of the bidder to furnish domestic source end products; compliance with that obligation is a matter of contract administration for the contracting agency, which has no effect on the validity of the contract award. Thus, we will not consider the matter. The Washington Management Group, Inc., B-211847, Mar. 20, 1984, 84-1 C.P.D. ¶ 329; McKenna Surgical Supply, Inc., 56 Comp. Gen. 531 (1977), 77-1 C.P.D. ¶ 261.

for *Milton J. Fowler*
Comptroller General
of the United States